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NO. 84-1199

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

JAYNE KING MOORE,

PETITIONER,

V.

STATE OF ALABAMA,

RESPONDENT.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

BRIEF FOR RESPONDENT STATE OF ALABAMA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an appellate court should consider allegations of an Appellant which alleged facts are not found in the record on appeal?

2. Whether a trial court must give a defendant's written requested charge on a principle of law in cases where the court's oral charge to the jury has already covered that same principle of law?

3. Whether the evidence of the State of Alabama was sufficient to justify the jury verdict finding the Petitioner guilty of illegal possession of controlled substances?

PARTIES

The caption contains the names of all parties to the proceedings in the courts below.

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OPINIONS BELOW

1. The decision of the Alabama Court of Criminal Appeals affirming the Petitioner's conviction was rendered July 17, 1984. Said opinion is reported as Moore v. State, 457 So.2d 981 (Ala. Cr. App. 1984).

On October 19, 1984, the Alabama Supreme Court denied the Petitioner's petition for a writ of certiorari, without opinion.

JURISDICTION

The jurisdiction of this Court is invoked by the Petitioner pursuant to 28 U.S.C. Section 1254 (1), and Article III, Section 2, of the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner is advancing her claims under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

STATUTORY PROVISIONS INVOLVED

Petitioner alleges her claims under Code of Alabama 1975, Sections 12-16-13 and 20-2-70. A copy of that statutory provision is set forth in the Petitioner's brief at pages 2-3.

STATEMENT OF THE CASE

A.

The Petitioner was indicted for violation of the Alabama Uniform Controlled Substances Act, Section 20-2-1. et. seq., Code of Alabama 1975. In the first count of a three-count indictment, Petitioner was charges with the unlawful possession of cocaine. The second count of the indictment charged the Petitioner with the unlawful possession of Diazepam, and the third count charged her with the unlawful possession of marijuana. The jury found the Petitioner "guilty as charged in the indictment" and subsequent to a sentencing hearing the Petitioner was sentenced to ten years imprisonment.

B.

The Respondent would adopt by reference

thereto the facts of this case as set forth in the opinion of the Alabama Court of Criminal Appeals found at 457 So.2d 981.

REASONS FOR DENIAL OF THE WRIT

I.

THE TRIAL COURT'S CONSIDERATION OF THE PRE-SENTENCE REPORT ON THE PETITIONER DID NOT CONSTITUTE A DENIAL OF DUE PROCESS TO THE PETITIONER.

The Petitioner contends that she was denied due process because the trial court considered a pre-sentence report furnished by the probation officer assigned to the Petitioner. The Petitioner also sets out certain facts in her brief which are not contained in the record of the proceedings but only included in assertions of fact not supported by the record. Initially, Respondent would submit that since the facts are not included in the record, those facts being the alleged assertion that the statements in the report were lies and that the trial court then reprimanded defense counsel

for this statement, the issue is not properly before the Court. Harris v. State, 420 So.2d 812 (Ala. Cr. App. 1982).

Further, the Respondent would submit that the argument of the Petitioner is not supported in the law. While it is reconized that with the type of background that the Petitioner has such a pre-sentence report could definitely be prejudicial to her sentencing, such in and of itself is insufficient to indicate a denial of due process. The system of using pre-sentence reports by a sentencing trial court judge has long been a practice in this State. The Petitioner has cited to this Court not case or proposition of law which would support a rejection of this procedure of criminal process as employed in the Courts of Alabama.

II.

THE TRIAL COURT'S ORAL CHARGE TO THE JURY SUFFICIENTLY COVERED THOSE ELEMENTS OF LAW APPLICABLE TO THE CHARGE FOR WHICH THE PETITIONER WAS BEING TRIED.

The Petitioner contends that several different jury charges which she requested were improperly refused by the trial court. However, at the close of the trial court's oral charge, only one of these issues was objected to by defense counsel as not being given. Therefore, the remaining written requested charges may not be reviewed on appeal since they were not properly preserved in the trial court below. Allen v. State, 414 So.2d 989 (Ala. Cr. App. 1981), affirmed, 414 So.2d 993 (Ala. 1982).

As to the issue which was objected to by defense counsel at the end of the trial court's oral charge to the jury, that issue

deals with the presence of the Petitioner at the scene where controlled substances are found as not being sufficient to establish possession.

The specific objection voiced by defense counsel at the trial is as follows:

> "The Defendant feels like, and so requested the Court charge that that particular knowledge must be followed by evidence that other facts and circumstances are involved to establish 'guilty knowledge', that knowledge alone is not sufficient unless it is accompanied by facts and circumstances showing that the Defendant exercised dominion, control, and the intention to do so, equivalent to the fact that it would be a guilty knowledge as opposed to mere knowledge. Mere knowledge would be equivalent to just mere presence." (R. 196).

The Respondent would cite the following exerpt from the trial court's oral charge to the jury:

> "Constructive possession is when you don't actually have it in your hand but you have the power to exercise control, and the intent to exercise that control, and some external manifestation, something positive, something overt, we say, some act that

a person takes towards accomplishing that intent. So, constructive possession, when you don't actually have it in your hand, when you do, however, have the power to possess it, the intent to exercise this possession, and then some act towards accomplishing that intent. The law says some external manifestation. Those three things, coupled with knowledge, coupled with knowledge that the substances are illegal. So, power of dominion and control, actual or potential physical control, intent to exercise this dominion or control, and some external manifestation, some overt act towards the accomplishment of the intent, plus knowledge equals constructive possession. Again, the term possession, which I read to you out of the law, includes constructive possession. Knowledge is not enough. It has to be a power of dominion and control, intent to exercise control, and external manifestation. Knowledge plus that. On the other side, the power, the intent, and the external manifestation is not enough without the knowledge. It takes all four."

The Respondent would submit that the principle of law requested to be charged from by the Respondent was therefore properly covered by the trial court's oral charge and the trial court's refusal of this written requested charge was proper. See

Campbell v. State, 423 So.2d 284 (Ala. Cr. App. 1982).

III.

THE EVIDENCE PRESENTED BY THE STATE WAS SUFFICIENT TO JUSTIFY THE JURY VERDICT FINDING THE PETITIONER GUILTY OF POSSESSION OF THE CONTROLLED SUBSTANCES FOR WHICH SHE WAS CHARGED AND TRIED.

The main allegation of the Petitioner in this regard is that the evidence presented by the State of Alabama was insufficient to make out a prima facie case against the Petitioner in that she was never shown to be in actual possession of the controlled substances which were seized and served as the basis for her indictment and trial. As the trial of this case, it was shown that the Petitioner admitted to one of the law enforcement officials at the scene that she and her husband lived in the trailer in which the controlled substances and paraphernalia were found. She contends

that there is no direct evidence to show her in actual possession of any of the contrclled substances which serve as a basis for her prosecution.

The evidence of the State was to the effect that law enforcement officers went to the home of the Petitioner and her husband with a search warrant. As the law enforcement authorities arrived the Defendant and her husband started for their mobile home trailer. Before reaching the trailer, the Defendant and her husband were apprehended by these law enforcement officials. These law enforcement officials then entered the trailer of the Petitioner and her husband and conducted a thorough search of the trailer and the surrounding premises and the vehicles located thereon. The investigation resulted in the seizure of several items of equipment and materials used in the

processing of illegal drugs. Literature and controlled substances were found in several places in the trailer, the surrounding property, and the vehicles on the property.

Where, the evidence raises a question of fact for the jury and said evidence, if believed, is sufficient to sustain the conviction, the trial court is proper in denying a motion to exclude and allowing the case to proceed for the jury's consideration. Young v. State, 283 Ala. 676, 220 So.2d 843 (1969); Henderson v. State, 347 So.2d 540 (Ala. Cr. App. 1977), cert. quashed, 347 So.2d 543 (Ala. 1977). Further, the possession of the controlled substance by the Petitioner may be established by circumstantial evidence. As set forth in Daniels v. State, 49 Ala. App. 654, 275 So.2d 169 (1973):

"In a prosecution for unlawful possession of narcotics it is not necessary

to prove mancupation but constructive possession may be shown, and where such possession is relied upon the State must also prove beyond a reasonable doubt that the accused knew of the presence of the prohibited substance. (Citations omitted)."

"Such guilty knowledge may be established by circumstantial evidence and guilt does not necessarily depend upon ownership. Parks v. State, 46 Ala. App. 722, 248 So.2d 761."

As to the Petitioner's contention that she was without knowledge of the controlled substances and materials and equipment used for processing of drugs, Respondent would submit that the issue of Petitioner's knowledge of the presence of these items on the premises was a matter which was properly submitted to the jury. Henderson, supra. In the introduction of the equipment and other materials found in conjunction with these drugs was properly admitted by the trial court to show "the complete story concerning the items found within the

residence area." Brantley v. State, 294 Ala. 344, 317 So.2d 345 (1975); Green v. State, 384 So.2d 1215 (Ala. Cr. App. 1980).

The Respondent submits that the facts in the case at bar, when viewed in light of the above-quoted standards of proof necessary in a possession case, are more than sufficient to have allowed submission of the issue to the Petitioner's guilt or innocence to the jury for its decision. See McHellen v. State, 351 So.2d 689 (Ala. Cr. App. 1977).

Based on the facts and authorities set forth above the Respondent would submit that the trial court was proper in allowing submission of this case to the jury and that the evidence was more than sufficient to justify the jury verdict finding the Petitioner guilty. Where the evidence shows the presence of the accused at the scene and

some knowledge of presence of the contraband is shown, along with other incriminating evidence, the issue of guilt is one for the jury. German v. State, 429 So.2d 1138 (Ala. Cr. App. 1982).

CONCLUSION

Based on the foregoing argument the Respondent would submit that the Writ of Certiorari requested by the Petitioner in this case is due to be denied.

Respectfully submitted,

/s/ Charles A. Graddick
CHARLES A. GRADDICK
ATTORNEY GENERAL OF
ALABAMA

/s/ J. Anthony McLain
J. ANTHONY McLAIN
SPECIAL ASSISTANT
ATTORNEY GENERAL OF
ALABAMA

CERTIFICATE OF SERVICE

I, J. Anthony McLain, a Special Assistant Attorney General for the State of Alabama, a member of the Bar of the Supreme Court of the United States and one of the attorneys for the State of Alabama, Respondent, do hereby certify that on this the ____ day of February, 1985, I served three copies of the foregoing Brief and Argument in Opposition to the Petition for Writ of Certiorari to the Court of Criminal Appeals of Alabama on the Petitioner by placing same in the United States Mail, postage prepaid and properly addressed as follows:

Jayne King Moore
P.O. Box 5071
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/s/ J. Anthony McLain J.
ANTHONY McLAIN SPECIAL
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GENERAL OF ALABAMA